Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

No. 96-868

IN THE
Supreme Court of the United States
October Term, 1996

JOHN CONLEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

LAURENCE H. TRIBE
Counsel of Record
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

PETER J. RUBIN
2027 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 265-5385

Counsel for Petitioner

February 8, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

14pp

TABLE OF CONTENTS

Page

Argument 1
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Griffin v. *United States*, 502 U.S. 46 (1991) 2, 9
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 9
United States v. *Bush*, 70 F.3d 557 (CA10 1995), cert. denied, 116 S. Ct. 795 (1996) 2, 7, 8
United States v. *Deninno*, 29 F.3d 572 (CA10 1994), cert. denied, 115 S.Ct. 1117 (1995) 5, 7
United States v. *Koonce*, 884 F.2d 349 (CA8 1989) 3-4, 5, 6, 7
United States v. *Lopez*, 42 F.3d 463 (CA8 1994) 6
United States v. *Mabry*, 3 F.3d 244 (CA8 1993), cert. denied, 114 S.Ct. 1403 (1994) 6
United States v. *Owens*, 904 F.2d 411 (CA8 1990) 1, 2, 3, 4, 7, 8
United States v. Pace, 981 F.2d 1123 (CA10 1992), cert. denied, 507 U.S. 966 (1993) 1, 2, 3, 4, 7, 8
United States v. *Slater*, 971 F.2d 626 (CA10 1992) 4, 6, 7
United States v. *Watts*, 65 U.S.L.W. 3461 (U.S. Jan. 6, 1997) 9, 10
United States v. *Wood*, 834 F.2d 1382 (CA8 1987) . 6

Constitution and statutes:

U.S. Const.:
Amend. V 2, 9

Constitution and statutes — continued: **Page**

U.S. Const. — continued:
Amend. VI 2, 9
18 U. S. C. § 371 . . . . . 1, 2, 3
21 U. S. C. § 846 . . . . . 1, 2, 3

United States Sentencing Guidelines and Commentary:

USSG §1B1.3(a)(2) 5
USSG § 2D1.1 . . . . . 4, 6
USSG § 2D1.1(a)(3) 5, 7
USSG § 1B1.2, comment., n.5 . . . . . 2, 3, 8
USSG § 2D1.1, comment., n.10 (Revised ed. 1988) . 5
United States Sentencing Commission, Guidelines Manual, App. C, Amend. 75 (1995 USSG) 10
United States Sentencing Commission, Guidelines Manual, App. C, Amend. 518 (1995 USSG) 6

ARGUMENT

The Acting Solicitor General concedes that this Court should "gran[t] plenary review" in an "appropriate" case to address the important constitutional issue implicated in this case, see Brief in Opposition ("Opp. Cert.") 14, and does not contest that the question presented involves an issue of "great practical importance" to the administration of the federal criminal justice system. See Cert. Pet. 24. The Government's arguments against granting review, Opp. Cert. 10-14, are conspicuously unconvincing and only confirm that a Circuit conflict on this issue is squarely presented here and that this is, indeed, an appropriate case for its resolution. Certiorari therefore should be granted.

1. The Government first argues, see Opp. Cert. 11, that *United States* v. *Pace*, 981 F.2d 1123 (CA10 1992), cert. denied, 507 U.S. 966 (1993), and *United States* v. *Owens*, 904 F.2d 411 (CA8 1990), do not conflict with the decision below because they involved prosecutions under the conspiracy statute "applicable to drug offenses," Opp. Cert. 10, 21 U. S. C. § 846, while the instant case is a prosecution under the more generally applicable conspiracy statute, 18 U. S. C. § 371.

Not a word is said to explain why this difference in the factual settings of the cases might be thought to have the slightest significance. See Opp. Cert. 11. The object offenses charged in *Pace* and *Owens* were drug offenses, and the defendants were of course prosecuted under the drug conspiracy statute. Because the object offenses in this case were not drug offenses, prosecution was brought under the general conspiracy statute.

But the statutes are *identical* in the relevant respect that they criminalize conspiracies to commit various offenses against the United States.[1] The question presented for

---

[1] 21 U. S. C. § 846 happens to be limited to conspiracies to commit "any offense defined in [the Drug Abuse Prevention and Control Subchapter]"; 18 U. S. C. § 371 is more broad, covering conspiracies to commit "any offense against the United States."

decision involves whether the Fifth and Sixth Amendments permit a judge in a multi-object conspiracy case to determine the object of the conspiracy and to impose the legally-mandated Guidelines sentence for the resultant offense of conviction when confronted with a general verdict that is ambiguous as to the object found by the jury. It is that constitutional question that was decided in *Pace* and *Owens* (and on which the Courts of Appeals are now split), not some question of statutory construction that might be limited to one or the other conspiracy statute.[2] The decision below thus can no more be distinguished from *Pace* and *Owens* on the ground that those cases involved drug prosecutions under 21 U. S. C. § 846, while this one involved an illegal gambling prosecution under 18 U. S. C. § 371, than it can be distinguished on the ground that those cases arose in Oklahoma and Iowa, while this one arose in Pennsylvania.

The complete irrelevance of the distinction suggested by the Government is reflected in the Sentencing Guidelines. Application Note 5 to Guidelines Section 1B1.2(d) applies to ambiguous multi-object conspiracy convictions under *either* statute. Thus the procedure challenged in the instant case — under which the judge determines the object offense under the reasonable-doubt standard — is authorized identically by the Guidelines in prosecutions brought under either conspiracy statute. *United States* v. *Bush*, 70 F.3d 557 (CA10 1995), cert. denied, 116 S. Ct. 795 (1996), in which the Tenth Circuit explained that its decision in *Pace* means that the Constitution prohibits the

---

[2] And of course the resolution of such a constitutional question rendered in a prosecution under the one statute controls in prosecutions under the other. See, *e.g.*, *Pace*, 981 F.2d at 1123 (applying this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), an 18 U. S. C. § 371 prosecution, in a prosecution brought under 21 U. S. C. § 846).

procedure authorized by Application Note 5 to Guidelines Section 1B1.2(d), see 70 F.3d at 561-562, involved a prosecution under 21 U. S. C. § 846; the instant case, in which that same procedure was upheld by the Third Circuit, was brought under 18 U. S. C. § 371.

The Government does point out that, under 21 U. S. C. § 846, the maximum statutory penalty is the penalty for the underlying object offense, while, under 18 U. S. C. § 371, the maximum statutory penalty is five years' imprisonment regardless of the underlying object offense. Opp. Cert. 11. This is true but again wholly irrelevant. Neither *Pace* nor *Owens* turned on the imposition of a sentence that would have been above the statutory maximum, see Cert. Pet. 22, and both decisions make clear that they involve only the question of whether, in an ambiguous-general-verdict situation, the court may use the Guidelines-mandated sentence for conviction of conspiracy to commit the more serious object offense.

2. The Government also contends that "it is questionable whether *Pace* and *Owens* represent definitive statements of law in the Eighth and Tenth Circuits," Opp. Cert. 11-12, because there is a "tension among th[e] precedents" within these two Circuits. Opp. Cert. 14.

There is absolutely no support for this assertion. The legal question that the Government contends is drawn into doubt by the cases it cites is

> whether a jury — as opposed to the sentencing court — must find the requisite facts to sustain imposition of a sentence for conspiracy that rests on a conviction for acts whose objects were violations of substantive offenses.

Opp. Cert. 11-12. But, to begin with the Eighth Circuit, the case cited by the Government, *United States* v. *Koonce*, 884 F.2d 349 (CA8 1989) — which was decided by that court *before* it decided *Owens* — *does not even involve a*

conspiracy conviction. And *United States* v. *Slater*, 971 F.2d 626 (CA10 1992), the Tenth Circuit decision on which the Government relies — and which, similarly, came *before Pace* — does not involve a judicial finding of the object of the conspiracy in that case. Further, neither decision even *addresses* the propriety of a judge, rather than the jury, making the findings to which the Government points.

And, even if those decisions had addressed that question, so that they might be said to stand for approval of the procedure followed in those cases — and even if those cases could somehow call into question the Courts of Appeals' more recent and definitive statements in *Pace* and *Owens* — the judicial findings concerning the form or quantity of drugs made in those cases have nothing to do with the type of finding at issue in *Pace*, *Owens* and the instant case: a judicial finding of the object of a conspiracy made in the face of an ambiguous general verdict in a multi-object conspiracy case.

Indeed, the cases on which the Government relies *all* involve only a determination by the district court for sentencing purposes of the quantity or form of a given type of drug involved in an unambiguous drug conviction. (These are determinations that district courts routinely make under Guidelines Section 2D1.1.) None of the cases cited by the Government can undermine *Pace* or *Owens* because none involved a finding of the object of a conspiracy. Indeed, none involved even a parallel situation (one that might be similar in principle) in which an ambiguity in a verdict is resolved by a judicial finding of an element of the offense — that is, a judicial finding as to a precise matter (such as, in the instant case, the conspiracy's object — illegal gambling, or money laundering), as to which the jury would properly have been instructed (as the jury was here) that it *had to agree unanimously*. See Cert. Pet. 5-6. Rather, in *every case* cited by the Government, the district court was faced with an

unambiguous verdict, and the quantity or form of the proscribed type of drug was *not* an element of the offense.

As to the Eighth Circuit, *United States* v. *Koonce*, on which the Government primarily relies, involved an unambiguous verdict that the defendant "unlawfully, knowingly and intentionally distribut[ed] or caused to be distribut[ed] or attempted to distribute methamphetamine." 884 F.2d at 350. At sentencing, as part of its calculation of the base offense level under Guidelines Section 2D1.1(a)(3), see 884 F.2d at 352 n.4, the court determined the particular isomer of methamphetamine involved in the case. But the *chemical form* of the methamphetamine was not an element of the offense, *e.g.*, *United States* v. *Deninno*, 29 F.3d 572, 579-580 (CA10 1994), cert. denied, 115 S.Ct. 1117 (1995), and the court was engaged in establishing *not* the offense of conviction — as to which there was no doubt — but the total quantity of the drugs that "were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2). In evaluating the Guidelines implication of a particular quantity of methamphetamine, the Drug Equivalency Tables in § 2D1.1 that were applicable in *Koonce* required a determination of whether the methamphetamine involved in the relevant transactions was simple "methamphetamine" (that is, D- or Dextro-methamphetamine), or methamphetamine of the "L-methamphetamine/Levo-methamphetamine" variety. See USSG § 2D1.1, comment., n.10 (Revised ed. 1988) (Drug Equivalency Tables) (treating one gram of each isomer as the equivalent of a different amount of cocaine).[3] This determination, made

---

[3] The Drug Equivalency Tables have not treated L-methamphetamine as a distinct substance since November 1, 1995. Under Amendment 518 to the Guidelines, the reference to L-methamphetamine was deleted, United States Sentencing Commission, Guidelines Manual, App. C. Amend. 518 (USSG 1995), so that "all forms of methamphetamine" are

for purposes of applying the Drug Equivalency Tables, was the only one made by the district court in *Koonce*.

And indeed, the other Eighth Circuit cases cited by the Government all found a judge's determination at sentencing of the quantity of drugs involved (or, in the case of *United States* v. *Mabry*, 3 F.3d 244 (CA8 1993), cert. denied, 114 S.Ct. 1403 (1994), the failure to instruct the jury to make a finding as to quantity) to be unproblematic precisely because — unlike the instant case — the judge was not making a finding of one of the elements of the offense of conviction. See *United States* v. *Lopez*, 42 F.3d 463, 470 (CA8 1994) ("[Q]uantity . . . was not an element of the offense . . . . For sentencing purposes, the court, not the jury determines quantity.") (citations omitted); *Mabry*, 3 F.3d at 250 ("Quantity matters only for purposes of sentencing. . . . As we have repeatedly held . . quantity is not an element of this offense.") (citations omitted); *United States* v. *Wood*, 834 F.2d 1382, 1390 (CA8 1987) (quantity is "a particular fact relevant to sentencing," not "an element of the substantive offense").

As to the Tenth Circuit, the *Slater* case cited by the Government is equally irrelevant. The convictions there were again unambiguous ones, one for possession with intent to distribute cocaine base within 1,000 feet of a public elementary school, and one for conspiracy to possess with intent to distribute cocaine base. See *Slater*, 971 F.2d at 629-630. The district court's finding, made in determining the weight of the drugs involved, was simply that all the transactions involved cocaine base, and thus were appropriately included in determining the total quantity of the drugs involved in the offense of conviction. See *id.*, at 639. (And again, as in *Koonce*, the propriety of

---

now "treated alike." See *id.* (commentary accompanying promulgation of Amendment 518).

the judge making this finding was not even at issue in the case. It was merely described in passing by the Court of Appeals. See 971 F.2d at 639.) *Slater* thus did not involve an ambiguous verdict, nor did it involve a determination by the judge of an element of the offense. And indeed, the other Tenth Circuit case cited by the Government — another case involving L-methamphetamine vs. D-methamphetamine — states that the type of methamphetamine may be "proved by a preponderance of the evidence at sentencing" precisely "*[b]ecause* the type of methamphetamine is not an element of the crime." *United States* v. *Deninno*, 29 F.3d at 580 (CA10 1994) (citations omitted and emphasis added); see *id.*, at 579-580 ("The government . . . had no duty to prove the type of methamphetamine. To convict a defendant, the prosecution must prove, beyond a reasonable doubt, only that the substance was generically methamphetamine.").

Petitioner obviously does not contend that there is something inherently improper about the district court making factual findings at sentencing that will result in determination of a Guidelines base offense level. See Cert. Pet. 28 (specifically citing Guidelines §2D1.1(a)(3)). Determinations of the form and quantity of drugs made at sentencing in cases of unambiguous verdicts — cases of the sort cited by the Government — have nothing whatever to do with the judicial determination, in a multi-object conspiracy case in which the verdict is ambiguous, of the object offense itself, and with the imposition of the legally-mandated sentence for the resultant offense of conviction. It is this latter type of determination that was held impermissible in *Pace* and *Owens*, but upheld in the instant case. See, *e.g.*, *United States* v. *Bush*, 70 F.3d 557, 561 (CA10 1995) (under *Pace*, "if a jury returns a general verdict which does not specify the object of a conspiracy, the defendant must be sentenced on the basis of the objective yielding the lowest offense level" "[b]ecause the

object of a conspiracy is an element of the offense");[4] *Owens*, 904 F.2d at 414-415 ("The general verdict form . . . did not allow the jury to indicate which of the two drugs it found to be the object of the conspiracy. . . . [T]he district court elicited an ambiguous verdict of guilty with two possible alternative interpretations. Under the circumstances of this case, the district court erred in sentencing Owens based on the alternative which yielded the higher sentencing range.").

Nothing cited by the Government even remotely calls into question the Eighth Circuit's decision in *Owens* or the Tenth Circuit's decision in *Pace*, each of which is in conflict with the decision below.[5] Its argument that this Court should await further developments in those Circuits before granting review, Opp. Cert. 13-14, is utterly unsupported.

---

[4] Although petitioner need not rely on the Tenth Circuit's decision in *Bush* to demonstrate the split among the Circuits, we note that the Government is incorrect in its conclusion that *Bush* "is distinguishable because it involved the adequacy of a guilty plea." Opp. Cert. 11 n. 3. The Tenth Circuit was faced in *Bush* with an allegation that it was "impossible to determine with a reasonable degree of certainty, either based on the indictment, the plea agreement, the petition for entry of a guilty plea, the colloquy at the change of plea hearing, the sentencing hearing, or some other part of the record," what the object was of the conspiracy to which the defendant in that case had pled guilty. *Bush*, 70 F.3d at 561. The Court of Appeals concluded that "there is no principled distinction between a jury verdict which does not specify the object of a conspiracy and a guilty plea which does not specify the object of a conspiracy" and that, consequently, "our analysis in *Pace* applies equally to both situations." *Id.* Application Note 5 to Guidelines Section 1B1.2(d) also clearly applies both to convictions after trial and to guilty pleas. See USSG § 1B1.2, comment., n. 5 ("Particular care must be taken in applying subsection (d) because there are cases in which the *verdict or plea* does not establish which offense(s) was the object of the conspiracy.") (emphasis added).

[5] Nor does the Government contest petitioner's assertion, Cert. Pet. 23, that the decision below cannot be squared in principle with decisions of the Second, Fourth, Ninth and D.C. Circuits. See Opp. Cert. 9-10.

3. Finally, although its argument has no bearing on the question of whether review is warranted to address the Circuit conflict implicated in this case, the Government contends that, on its merits, the decision below is correct because it follows "*a fortiori*" from this Court's decisions in *Griffin* v. *United States*, 502 U.S. 46 (1991), *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986) and *United States* v. *Watts*. 65 U.S.L.W. 3461 (U.S. Jan. 6, 1997) (per curiam).

This is demonstrably incorrect. *Griffin* held that a general verdict of guilt in a multi-object conspiracy case could be upheld even when the evidence was insufficient as to one of the object offenses. See 502 U.S. at 56-60. Petitioner does not argue with this ruling, nor does he deny that the jury in the instant case found that he conspired to commit at least *one* of the object offenses charged in the indictment. He contends only that in the case of an ambiguous verdict, because of the Fifth and Sixth Amendments, the verdict may not be treated as though it were a conviction for conspiracy to commit the greater object offense. *Griffin* says nothing at all about this issue.

McMillan held that, within certain limits, a legislature may provide for "a sentencing factor" that "is not an element of" the offense, 477 U.S. at 85-86, to be found by the judge at sentencing. Again, petitioner has no quarrel with that ruling. In this case, however, the judge did not find a mere sentencing factor. The Guidelines applicable to this case do not create "a factor that happens to mirror a determination made by the jury," Opp. Cert. 8, and the Government points to no provision that purports to do so. Instead, the Guidelines impose sentence on the basis of the "offense of conviction." See Cert. Pet. 8-9, 28-29. Respect for the Guidelines as a statement of law requires recognition of this distinction. In this case, the offense of conviction — conspiracy to launder money — was established by a beyond-a-reasonable-doubt finding by the judge and not the jury. The judge thus did not find a

sentencing factor; precisely as the Sentencing Commission intended, he "creat[ed] . . . what is, in effect, *a new count of conviction*." United States Sentencing Commission, Guidelines Manual, App. C., Amend. 75 (1995 USSG) (emphasis added).

The Government also relies on *United States* v. *Watts*. But petitioner has never argued that his case implicated the split in authority that *Watts* resolved, see Cert. Pet. at 28-29 n. 12, and that *per curiam* opinion accordingly has no bearing here. *Watts* held that the district court may take into consideration — in determining the presence or absence of a sentencing factor — conduct that underlay charges of which the defendant was acquitted. But the object offense in this case, as we have seen, was not employed by the Guidelines as a mere sentencing factor — a "sentencing enhancemen[t]" that simply "increase[d] [petitioner's] sentence because of the manner in which he committed the crime of conviction." *Watts*, 65 U.S.L.W. at 3462. Rather, this case involved a finding by the judge of what the very crime of conviction *was*. This case, in short, involves a judicial *conviction* — not just a sentencing determination.

CONCLUSION

This case implicates an important constitutional issue on which the Courts of Appeals are divided. Certiorari therefore should be granted.

Respectfully submitted,

Laurence H. Tribe
Counsel of Record
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Peter J. Rubin
2027 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 265-5385

Counsel for Petitioner

February 8, 1997